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No. 76-1664

In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIPE GAMA-GARCIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the finding of the Immigration Judge that petitioner is deportable because he obtained a visa by entering into a sham marriage with a United States citizen is supported by clear and convincing evidence.

STATEMENT

1. On April 19, 1973, the Immigration and Naturalization Service issued an order to show cause why petitioner, a native and citizen of Mexico, should not be deported under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), because he had been excludable at the time of his entry in August 1970, both for having procured his visa by fraud within the meaning of Section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19), and for not being in possession of a labor certification as required by Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14).[1] Specifically, the government charged that petitioner had entered into a sham marriage with a United States citizen, Lydia Colon, for the sole purpose of obtaining permanent residence in the United States.

At the deportation hearing, Colon testified in substance that in 1968 she had agreed "to go through a marriage ceremony with [petitioner] for $400" provided that "she would not have to sleep with the man or live with him, and that a divorce would be arranged within three or four weeks after the marriage" (Pet. App. 5). Following the marriage several days later, she went to an office and signed a visa petition, then received the $400 (Pet. App. 6). She did not see petitioner again until divorce proceedings in court in January 1973 (*ibid.*).

Alicia Massa-Medina, who had been present when the offer of marriage was made to Colon, confirmed the understanding of the parties that the marriage would not be

[1]At the deportation hearing the government also charged that petitioner was deportable under Section 241(a)(1) for failure to have a valid immigrant visa at the time of entry as required by Section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20).

"real" and that a divorce would be arranged thereafter (Pet. App. 7). Although a close friend of Colon, Massa-Medina never saw petitioner in Colon's presence after their "marriage"; nor did she see any evidence of a man living with Colon (Pet. App. 7-8).

Petitioner's testimony was that his marriage to Colon was bona fide and that they had cohabited together after their marriage but had not lived together permanently because Colon was receiving public assistance benefits that she would lose if she were found living together with a man. Petitioner denied being party to the payment of money to Colon for the purpose of marrying him (Pet. App. 9-10, 13-14).

2. After careful consideration of the evidence (see Pet. App. 1-18), the Immigration Judge found that petitioner's marriage was a fraud that he had entered into solely to obtain permanent residence in the United States. As the Judge noted (Pet. App. 17), "the issue here is one of credibility. I must decide whether or not I believe [petitioner's] version of the circumstances and reasons for his marriage to Lydia Colon or whether I believe Lydia Colon's testimony." The judge then said (*ibid.*):

> [Petitioner] in testifying before me was frequently hesitant and reluctant in answering questions put to him by the Trial Attorney. Having had the opportunity of observing [petitioner's] demeanor and his manner of testifying, I find his testimony to be lacking in credibility and unworthy of belief. On the other hand, Lydia Colon's testimony was direct, forward, and unhesitant. She testified unequivocally that the arrangement with [petitioner] was that she marry him for the sum of $400

> after which she would not cohabit with him * * *. I find her testimony credible and worthy of belief.

The judge noted further that "Lydia Colon, who is aware that she is afflicted with cancer, would have no incentive to testify falsely at this late date" (*ibid.*). He therefore concluded that petitioner's deportability on all charges had been proved by "clear, convincing, and unequivocal evidence" (*ibid.*).

On March 17, 1976, the Board of Immigration Appeals dismissed petitioner's appeal of the order of deportation (Pet. App. 19-22). The court of appeals affirmed, holding that "there is substantial evidence that [petitioner's] marriage was a sham at its inception" (Pet. App. 1a-4a).

ARGUMENT

Petitioner contends, citing *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, that the court of appeals erred in affirming the finding of deportability on the ground that the government had proven its case by "reasonable, substantial and probative evidence" (Pet. App. 2a), instead of determining whether the finding was supported by "clear, unequivocal, and convincing evidence" (Pet. 5). This contention confuses the standard of proof in deportation cases with the standard of appellate review.

In *Woodby*, this Court held that an Immigration Judge could not enter a deportation order unless the government proved the facts supporting deportation by "clear, unequivocal, and convincing evidence" (385 U.S. at 286). This Court also recognized, however, that the court of appeals, in determining whether the government had met this burden, was not to make its own independent finding but was to determine whether or not the finding of the

Immigration Judge was supported by "reasonable, substantial, and probative evidence on the record considered as a whole" (*id.* at 281-284). To illustrate the difference in the two standards, the Court pointed to the difference between burden of proof and scope of review in criminal cases, where the government must prove guilt to the fact-finder beyond a reasonable doubt but the reviewing court asks only whether the judgment below "is supported by substantial evidence" (*id.* at 282). See Section 106(a)(4) of the Act, 8 U.S.C. 1105a(a)(4); *Kokkinis* v. *District Director of Immigration and Naturalization Service*, 429 F. 2d 938 (C.A. 2); *Yaldo* v. *Immigration and Naturalization Service*, 424 F. 2d 501 (C.A. 6).

Here, both the Immigration Judge and the Board of Immigration Appeals (Pet. App. 21) found that the government had proved petitioner's deportability on all charges by clear, unequivocal, and convincing evidence. The court of appeals, applying the appropriate standard of review, then concluded that this finding was supported by reasonable, substantial, and probative evidence. That conclusion is correct and no further review is warranted.[2]

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[2]Contrary to petitioner's contention, the pendency of petitioner's motion to reopen the deportation proceeding is no reason to grant the petition. As petitioner notes (Pet. 5), the motion is based upon his contention, not raised in the court of appeals, that he is eligible for discretionary relief from deportation under Section 212 (c) of the Act, 8 U.S.C. 1182(c). That issue is separate and distinct from the question raised here whether petitioner is deportable as charged, and must therefore be presented first to the administrative tribunal. Moreover, if the Board of Immigration Appeals determines that petitioner is not entitled to relief, he will have an adequate opportunity to appeal that finding to the court of appeals, and, if necessary, to seek review in this Court.

Finally, whether, or to what extent, the Executive Branch is considering changes in the immigration policy with regard to "aliens who have been in the United States such as [petitioner]" (Pet. 5) is irrelevant to the lawfulness of petitioner's deportation. It is

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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well established that deportation is not cruel or unusual punishment. See *Mahler* v. *Eby*, 264 U.S. 32; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *LeTourneur* v. *Immigration and Naturalization Service*, 538 F. 2d 1368 (C.A. 9), certiorari denied, January 10, 1977 (No. 76-5356); *Brea-Garcia* v. *Immigration and Naturalization Service*, 531 F. 2d 693 (C.A. 3); *Oliver* v. *United States Department of Justice*, 517 F. 2d 426, 428 (C.A. 2), certiorari denied, 423 U.S. 1056; *Santelises* v. *Immigration and Naturalization Service*, 491 F. 2d 1254, 1255-1256 (C.A. 2), certiorari denied, 417 U.S. 968; *Bufalino* v. *Immigration and Naturalization Service*, 473 F. 2d 728, 739 (C.A. 3) (Adams, J., concurring), certiorari denied, 412 U.S. 928; *Chabolla-Delgado* v. *Immigration and Naturalization Service*, 384 F. 2d 360 (C.A. 9); *DeLucia* v. *Immigration and Naturalization Service*, 370 F. 2d 305 (C.A. 7), certiorari denied, 386 U.S. 912; *Burr* v. *Immigration and Naturalization Service*, 350 F. 2d 87 (C.A. 9), certiorari denied, 383 U.S. 915; *United States ex rel. Circella* v. *Sahli*, 216 F. 2d 33 (C.A. 7), certiorari denied, 348 U.S. 964; cf. *Ingraham* v. *Wright*, No. 75-6527, decided April 19, 1977, slip op. 16.

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